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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Docket No.
80-1926

JOHN J. BOLEMAN,

Petitioner

-against-

THE CONGDON AND CARPENTER COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals marshall the facts most favorable to the plaintiff in accordance with the standards for the review of a Motion For Judgment Notwithstanding The Verdict and allowed him the benefit of all such favorable inferences as may reasonably be drawn from the facts proven as established by the adjudicated cases?

Parties

The parties to this action are the same as contained in the caption.

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Opinion Below

In this action originally brought pursuant to 29 U.S.C. Sec. 621, Age Discrimination in Employment, the Court of Appeals for the First Circuit reversed the judgment of the District Court for the District of Massachusetts based on

the denial of the defendant's Motion For Judgment Notwithstanding The Verdict, after entry of Judgment for the plaintiff in the sum of $164,864.00 on the additional claim of breach of an oral contract of lifetime employment.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on January 14, 1981 and this Petition For Certiorari was entered on May 14, 1981, under a Motion To Extend Time. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1245 (1).

Statutory Provisions Involved

This case involves the Seventh Amendment to the Constitution of the United States. That Amendment reads:

> "In Suits ~~of~~ at common law, where the value in controversy shall exceed twenty

dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statement of the Facts

The plaintiff was employed by the Defendant, Rhode Island Company, in 1937, when he was 26 years of age. Over a period of seventeen years, he swept floors, moved into the freight department, served three years in the United States Marine Corps., and became an inside desk salesman until 1957, when William H. Cotter, Sales Manager of the defendant company, offered him the job of an outside salesman to develop a territory in the Worcester, Massachusetts area which the defendant had been planning for twenty-three years. At the time, Mr. Cotter had been with the company for two years. He was a graduate of a law

school, and got along very well with the plaintiff. In 1960 Mr. Cotter left the company, and died in September, 1975.

The plaintiff testified that at the time of the interview Mr. Cotter said:

> "I am offering you the job of an outside salesman. He says, we would want you to move to Worcester and establish a residence there. And I told him before I would, I could possibly talk to my wife, that I would have to have more information. He told me it was the opportunity of a lifetime, that if I moved my family to Worcester, Worcester would become my base of operations irrespective of what territory I might be assigned to and that -- oh, yes, he also told me that for that particular time it would be restricted to the City of Worcester only. But in the event --

> I asked him if I would be expected to move at another time, and he said no, that Worcester would be my home, it would be my base of operations, irrespective of what territory might be assigned to me. He told me he was giving me a life-time opportunity. And he said that with my knowledge, practical and technical, that I would have a job with the company for life.
>
> So, I went back to my desk and sat down and took it easy, so to speak, for the rest of the day until it was time to go home." (Emphasis added). (Rec. page 45).

The plaintiff discussed the matter with his wife and had a second conversation with Mr. Cotter. In that conversation the plaintiff said:

> "I told Mr. Cotter that my wife and I had talked it over and she was agreeable to make the move with me, basing her agreement on Mr. Cotter's promises. And Mr. Cotter reiterated them."

He continued:

> "Well, I told him my wife and I had talked it over and I was going to take the job. My wife was agreeable because of the propositions that Mr. Cotter made to me. He repeated them. He said that I had a lifetime job with the company, that irrespective of the territory I might be assigned, Worcester would be my base of operations. And he repeated--if I remember correctly--that it was a lifetime opportunity.
>
> So before I left the office that time he put three restrictions on me: 1, that I was not to tell anybody about the new warehouse; 2, I was not to tell anybody that I was becoming an outside salesman; and 3, that I had to move myself and my family to Worcester as quickly as possible." (Rec. pp. 46, 47).

On cross-examination, the plaintiff testified that he understood and relied

on Mr. Cotter's statements "as a completely unconditional guarantee of a lifetime job as a salesman," that "I would have a job with the company. If I had no sales in Worcester or some area like that, I was going to be assigned to another area..." "The guarantee was of a job for a lifetime." He understood that he was guaranteed maintenance of a residence in Worcester as a salesman, no matter what territory he was asked to cover, and would be given territory close enough to Worcester to work it." (Rec. p. 105, ll. 6-10; 16-18; p. 106, l. 14; p. 107, ll. 6-11; 21-23).

At the time the offer was made, Mr. John H. Congdon was Vice-President and General Manager. His father was President. He was also "Acting Chief Executive Officer," because of his father's illness. In that capacity, he and his

staff had been involved in market research for the Worcester area. In March, 1957, he succeeded his father as President. His closest associate in the project at that time was Donald H. Bump, then Executive Vice President and General Manager. Mr. Bump had come into the company in 1957, had been Manager of the defendant's Fall River plant, moved up to Executive Vice-President and General Manager when Mr. Congdon became President, and remained in that position until his retirement. Mr. Congdon and Mr. Bump together chose the plaintiff for the Worcester job. However, Mr. Congdon made the final decision. (Rec. p. 157, l. 8; p. 159, l. 3) He described himself and Mr. Bump as the "management." As President he referred

to Mr. Bump as his "representative," and was sure that he and Mr. Bump had discussed the matter with Mr. Cotter. Mr. Congdon testified that he gave Mr. Cotter the authorization to "proceed with the arrangement," which was the lifetime employment as testified by the plaintiff.

The testimony was as follows:

"Q. Did you discuss the matter with Mr. Boleman yourself at any time?

A. I'm not sure, sir. I assume that I may have, but I cannot say categorically. It was a long time ago. (Rec. p. 157, ll. 10 - 14)

* * *

Q. And you didn't remember that you had any?

A. Let's say, yes. (Rec. p. 157, ll. 23, 24)

Q. Now, you never gave Mr.

Cotter direct authority to do anything with respect to Mr. Boleman's being hired as an outside salesman in the Worcester territory, did you? Personally? As a General Manager?

A. I have just said, sir, that after the selection was made by management, meaning me and Mr. Bump--obviously it was discussed with Mr. Cotter--I gave the authorization to Mr. Cotter to proceed with the arrangement. (Rec. p. 161, ll. 12 - 16).

* * * *

Q. I am asking, sir, did you authorize Mr. Cotter directly personally to give him the full authority to talk with Mr. Boleman about his going to Worcester and taking over that territory?

MR. PERRAS: Objection.

THE COURT: Did he give authority that was his to Mr. Cotter? I'll allow him to answer. In other words, was he the person who gave the

instructions to Mr. Cotter?

Were you that person, sir?

THE WITNESS: I assume so, sir.

MR. CARONNA: May that --

THE COURT: I'm juding that means that he has no direct recollection, but the probabilities are that he did. I'll allow it to stand." (Emphasis added.)

The plaintiff began immediate preparations for the move to Worcester, while Mr. Congdon sought out and found an apartment which the plaintiff did not find suitable. The plaintiff began his duties in May, 1957, and the family moved into an apartment five months later. At some "unspecified time," the plaintiff and his wife drove to Rhode Island Worcester to pick up a company car. Mrs. Boleman testified that Mr. Bump

"...came over to the car and he

said how do you like Worcester? And I said I didn't. And he said well, you'll have to make up your mind to like it because you're there for life; your husband has a permanent job there. And so he left and then he told my husband that I said what I thought, that I didn't keep anything back." (Rec. p. 120, 118 - 124).

Mr. Bump did not rebut this testimony.

Sometime later, the Worcester County Institution For Savings, at Worcester, Massachusetts, sent a form addressed to the defendant requesting verification of the plaintiff's employment. This was in connection with a long-term mortgage loan for a home the plaintiff finally purchased fourteen months after beginning his new job. The record shows that plaintiff's counsel read the document to the jury:

"The Probability of continued

employment and other remarks: Mr. Boleman is a very definitely included as a participant in our future growth plans. Dated October 6th, 1958, William H. Cotter, Junior, Manager of Sales, the Congdon & Carpenter Company." (Emphasis added).

At the outset, the plaintiff was restricted to the Burlington area, such as Route 3 and 62, and Middlesex Turnpike, east of the Worcester area. Subsequently, both the Worcester and east of Worcester area became developed and were called No. 6 and No. 7, respectively. One Jack Harrington was assigned to No. 7.

In his deposition, taken at his home in Somerset, Massachusetts, the end of the first day of trial because he had been bedridden, Mr. Bump acknowledged that he was the "head man" of the company. (Rec. p. 140, ll. 1, 2)

"knew what was going on," (Rec. Id 1. 7) and had hired Mr. Cotter, who reported to him "practically every day," on a daily basis (Rec. p. 126, 11. 14 - 18) He said he participated in the choice of the plaintiff. (Rec. p. 139, 11. 20 - 28).

Fourteen years later in the company's trade publication called the "I-Beam," (Plaintiff's Exhibit 2) the company's field representatives were pictured on an inside map showing their respective territories. Each picture was briefly editoralized. Under the plaintiff's photograph, appearing at the top of the page and above all others, the note said:

> "John J. Boleman, a resident of Worcester, Massachusetts, is a do-it-yourselfer and a student of processes of government and politics;

on the company team for 34 years, the dean of our field sales force." (Emphasis added).

On December 27, 1973, Mr. Cummings, the Sales Manager told the plaintiff in the presence of Mr. Young, then President, that they wanted him to take over territory No. 2. The record shows merely that the plaintiff said "No." There was no threat of discharge, at that time, and no discussions with the plaintiff from that time until October, 1974, when Mr. Cummings first gave the plaintiff an ultimatum to decide by November 15, 1974 to move into territory No. 2 by January 1, 1975 or he would be forced into early retirement. Plaintiff was now 56 years and 8 months old. The plaintiff reminded the defendant of his previous decision, but decided to discuss this

his wife, who by this time had been a very ill woman with a serious heart condition, a fact known to the defendant and which required numerous hospitalizations which required the plaintiff's presence at the outset. The plaintiff counter-offered with a proposal to take the territory but not to move into it. The defendant refused his counter-offer on the ground that it would be establishing a precedent. The plaintiff was promptly fired when he asked to keep his scheduled appointment for a discussion of the problem, accompanied by his attorney. It was Mr. Bump who gave the final approval to terminate the plaintiff. (Rec. p. 131, ll. 12 - 20).

The plaintiff promptly filed for

unemployment compensation, received some benefits, found himself a few jobs in related industries, and last worked in a Worcester area company which the defendant had purchased shortly before the case came to trial. The defendant's exhibits of statistical breakdowns of sales in the years 1972 to 1974 show that the plaintiff's territory increased to within the $700,000 area gross sales, up from the $400,000s. Furthermore, it shows that the plaintiff was in fact the third highest producer of all eight territories. (Rec. pp. 206, 207).

On the question of "establishing a precedent" in not living in one territory, Mr. Congdon testified that:

"it was well-known company

policy that insofar as possible, a salesman must live within the geographical boundaries." (Emphasis added).

REASONS FOR GRANTING THE WRIT

It is well established by the adjudicated cases that in reviewing the denial of a Motion For Judgment Notwithstanding The Verdict, the jury having found the issues in favor the plaintiff the reviewing court

> "must view the evidence in a light most favorable to the prevailing party. We must assume as proved all facts which plaintiff's evidence tended to prove and plaintiff is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proven. We must assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiff." (Emphasis added).
>
> (Thieman v. Johnson, 257 F 2d 129, 130, CA 1, 1958).

In a recent case, a Court of Appeals added that:

> "...the trial court may grant

> judgment n.o.v. only where there is such a complete absence of evidence supporting the verdict that a jury's finding could only have been a result of sheer surmise and conjecture or there is such an overwhelming amount of evidence in favor of the movant that no reasonable and fair-minded men could arrive at a verdict against him." (Mattivi v. S. African Marine Corp. CA N. Y. 1980, 618 F 2d 163, 167). (Emphasis added)

In our view the Court of Appeals failed to follow these standards. It committed its basic error in failing to be bound by the facts and (1) marshalled only those facts in a biased manner which tended to favor the defendant, (2) failed to draw all such favorable inferences as may reasonably be drawn in favor of the plaintiff from the facts proven, and (3) violated the fundamental principle that there must be a minimum interference with the jury. In short it was tantamount to resolving, instead, a factual dispute in favor of the defendant. (Cf. Bentley v.

Stromberg-Carlson, CA Cir. 2, Jan. 8, 1981, No. 80-7285).

We submit that the facts most favorable to the plaintiff's case are as follows:

1. Mr. Cotter, as Vice-President and General Manager, and as "Chief Executive Officer" during his father's illness while the latter was President, gave Mr. Cotter the "instructions and authorization" to "proceed with the arrangement," which is the lifetime employment claimed by the plaintiff as the jury found.

2. Mr. Congdon and Mr. Bump constituted the "management" of the company, and Mr. Bump acknowledged that at the time in issue he was the "head" man of the company. They both concurred in the choice of the plaintiff as the man who could do the job and Mr. Bump discussed the matter with Mr. Cotter. Mr. Bump was Mr. Congdon's "representative"

while the latter was President. The jury could conclude that these three persons were equally and very closely involved in this project, and that their conversations confirmed the plaintiff's claim of lifetime employment.

5. The company's trade publication, the "I-Beam" showing the picture and designation of the plaintiff as "Dean of the field sales force" with 34 years in the company, and a "student of the processes of government" was sufficient ground for the jury to find that up to three years before they terminated the plaintiff, the defendant had not only an especially high regard for the plaintiff's ability and integrity, but also a better than average intelligence. In which case, the jury could conclude that the plaintiff and Mr. Cotter were not likely to misunderstand each other. On this basis, the jury's finding that Mr.

Cotter was offering, on behalf of the defendant, a lifetime job, and that the plaintiff would not have risked his relocation without some assurance of permanency with the company, was a reasonable and legitimate inference.

6. The defendant's reference in the Worcester Bank's request for employee credit that the plaintiff was "very definitely included" in the defendant's "future growth plan," was strong evidence of the plaintiff's claim that he would be a permanent resident of Worcester or he would not have assumed a high credit risk. Also the bank could rely on the statement.

7. Mr. Congdon's admission that salesmen did not necessarily have to live within their territories was favorable in that the jury could infer that Mr. Congdon had given Mr. Cotter "instructions" as well as authority to discuss the "arrange-

ment" with the plaintiff and that the "arrangement" in fact included a permanent base in Worcester.

8. Mr. Bump's failure to rebut Mrs. Boleman's alleged conversation about her feelings about Worcester and Mr. Bump's voluntary reference to a "permanent job" in Worcester, was favorable in that as "head" man, who knew what was going on, did not deny even the substance of that conversation. Here there was a reasonable and legitimate inference that Mrs. Boleman's testimony was true.

9. The questions posed to Mr. Congdon and Mr. Bump and their answers are not an example of testimony "so overwhelming" in favor of the defendant that the jury had to find in its favor.

The Trial Court's Function

Viewing the above, we have here more than "a mere scintilla of evidence" that

justified the Trial Court in believing that the case should go to the jury. Since the standards for reviewing a Motion For Judgment n.o.v. are applicable to both the District Court and Court of Appeals, we must assume that the Trial Court did not act on a "preponderance" of the evidence, but that it applied the prescribed standards and concluded that the plaintiff had adduced sufficient evidence to create a jury issue. Nor can it be said that the trial court had before it such "complete absence of evidence," or, as the Lavender case (supra) states, "of probative facts", that the verdict was "sheer" surmise and conjecture; or that the evidence on the part of the movant was "so overwhelming" in its favor, that "no reasonable and fair-minded men could arrive at a verdict against him." (Cf. Mattivi case, cited above). The trial court must

be aware of this court's special reliance on the trial court to preserve inviolate the constitutional nature of a jury trial.

In short, being "on top" of and sensing the pulse of the case, it is entitled to "broad discretion" ...in balancing probative value against prejudice." Longnecker v. G. M. Corp. 594 F. 2d 1283, 1286, CA 9, 1979; Dick v. New York Life Insurance Company, 1959, 79 S. Ct. 921, 927, 359 U. S. 437, 447. This is not to say the Court is infallible, but it does say he is in a better position to believe the case should go to the jury. Also, the trial judge must indeed be aware of how far this Court permits him as well as Appellate Courts, to go in preserving that right, because this Court has said it will scrutinize with utmost care any "seeming curtailment" of that right

Dimick v. Schiedt, 239, U.S. 474, 486, 55 S. Ct. 296, 301; recognizing that there is a measure of speculation and evidence where fair-minded men draw different inferences "...by choosing what seems to them to be the most reasonable inference." Lavender v. Kurn, 1946, 66 S. Ct. 740, 744, 327 U. S. 645, 653, (emphasis added). Thus it has gone so far to protect this right that it has expressed a liberal test of evidence that where contrary conclusions can be drawn, "but there is evidence from which a jury could reach" the conclusion that it did reach, "That (is) enough." Berry v. U. S., 321 U. S. 450, 61 S. Ct. 637, 640. Here is evidence of this court's more liberal view than Courts of Appeals in allowing cases to go to the jury. (Cf. Charles Alan Wright, Law of Federal Courts, Ch. 10, Sec. 95, at page 426, and cited in numerous cases). What is a legitimate or reasonable infer-

ence is, however, "difficult to determine." But it has been stated that the Courts say

> "...that the inference is legitimate only where the evidence offered makes the existence of the fact to be inferred more probable than the non-existence of the fact, and they warn that any lesser test would permit the jury to rest its verdict on speculation and conjecture (note 45)... rarely does the Court have any way of knowing what the mathmatical probabilities are..." (Cf. Charles Alan Wright, cited at page 425).

Finally, this Court's test of sufficiency of evidence, recognized by courts and commentators as applicable to all cases, and not merely to Federal ~~Lawyers~~ Employer's Liability and Jones Acts, can be summarized as follows:

> "so long as there is evidence from which an inference might rationally be drawn, it is for the jury to accept or reject the inference even though it may be improbable and even though some conflicting inference is highly probable," Lavender

v. Kurn cited at pages 743, 744; discussed in Law of Federal Courts, cited above, pp. 425-427.

Underlying all of these rules, standards and their formulations, however, "troublesome," they may have been (as a Court of Appeals has said) is the fundamental principle that "there must be a minimum interference with the jury." (Cf. Barron & Holtzoff, (Wright Ed.) Chap. 7, p. 2524; cited in Yazzie v. Sullivent, 561, F. 2d 183, 188, 1977).

THE REVIEWING COURT'S APPRAISAL OF QUESTIONS UNDECIDED

We reply to this aspect of the opinion in deference to that Court, and because its approach and appraisal tend to show, however, unwittingly, a biased approach to the matter.

The court's choice of the quoted parts of the conversation is, in the light of all of the conversations clearly out of context. The court's construction of some of the conversation as amounting to a lifetime job even though his work was not "satisfactory", is unwarranted. First, that is not what the plaintiff says; that could not have been what he meant, and this jury on all of the evidence found that that was not what he meant. In any event inconsistencies concerning the plaintiff's "understandings", (p. 4), however the court may feel that each "understanding" diminished the plaintiff's "business ~~understanding~~ *underlaking*", were for the jury to determine.

We respectfully disagree with the Court's appraisal of the defendant's undertaking as "promotion" and a "minor undertaking". As to the latter, the Court's footnote referring to the Carnig case "consideration" issue, is met by the trial judge's ruling in his memorandum of law deciding the cross-motions for Summary Judgment, on page 4 therein, and referring to the plaintiff's relocation, saying:

"Such a relocation is an ample change of position to support a contract such as that alleged to be at the basis of this action". (Rec. p. 24).

We, too, "would find it hard to think" that the defendant, having undergone expense for a new warehouse, and 23 years of research, would conceivably have contracted as alleged by the plaintiff. (Page 4).

Indeed the Court's appraisal here as a "minor undertaking" not only denigrates the plaintiff's contribution to the defendant in

the light of all the facts, but also appears to criticize the propriety of the defendant's business judgment in hiring this 40 year old plaintiff who lacked

> "any experience as an outside salesman, and was offering a binding commitment of lifetime employment, free of transfer from a yet untried territory, simply in consideration of his taking a promotion that would entail moving from Providence to Worcester."

Taking these words at face value, one could reasonably infer that the reviewing Court would <u>not</u> find it hard to think so, if all the other conditions were met. As to these, the plaintiff had been with the company a <u>half-lifetime</u> already; he had acquired an expertise inside the company in every respect. No "new territory" is ever established overnight and Mr. Congdon did not think it wise "to transfer a salesman out of his territory needlessly." The plaintiff packed up his family with four little children and left his native home and went to

a new area where there was the possibility of failure for reasons outside his control. Lastly, any change amounting to higher pay, especially coupled with more administrative and discretionary judgment, is "promotion." The Court unjustifiably gives this word a pejorated meaning.

We quite agree with the reviewing court's citations of the Timmins and Campion cases cited on p. 3 of its opinion. They express principles of law, which on all of the facts of this case, and viewed most favorably for the plaintiff would apply in his favor.

Lastly, the Court views the offer as:

> "A far more reasonable and perhaps the only fair interpretation is that plaintiff was simply assured of a promotional opportunity that was expected to last into the indefinite future; a statement of an "opportunity" with an expectation of continuance."

First, the court is assuming the position of the jury, and in effect casting language of construction and interpretation of facts of its own, tantamount to lifetime employment; here the "offeror led the offeree reasonably to believe that he had been offered a lifetime job (the Timmins case) and that he could distinguish between a "lifetime opportunity," "opportunity of a lifetime" and "lifetime employment" (the Campion case).

Second, this language is too vague and too indefinite to contradict the clear statements of the plaintiff as to a definite promise of a Worcester base, and a definite promise of "a job for the rest of his life" if he made the move. Regrettably, Mr. Cotter's death only compounded the problems.

Conclusion

We submit that there was here no such "complete absence of probative facts" to support the conclusion reached by the Appellate Court. We maintain that a reading of the facts most favorable to the plaintiff, allowing for legitimate and reasonable inferences on the facts proven, there was here an "evidentiary basis" for the jury's verdict, that this basis was sufficient under this Supreme Court's "test of evidence" and that the jury was entitled to

> "discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or fell that another conclusion is more reasonable."
>
> Lavender v. Kurn, cited at page 744.

We respectfully submit therefore that there is in the instant case sufficient

evidence for the jury to have found that it was more probable than not that the defendant authorized and instructed Mr. Cotter to offer the plaintiff the "arrangement" for lifetime employment.

Finally, we note that "only about 10% of civil actions commenced in federal court are actually disposed of by trial. Of those... the majority are tried to a judge, rather than a jury." (Charles Alan Wright, cited Sec. 96, p. 427). We respectfully suggest that the elements involved in this case warrant a review by this Court. Lifetime employment contracts are clearly extra-ordinary. When they go by summary judgment, Motion For Directed Verdict at the end of a case, a verdict in favor of the plaintiff, and after a clear opportunity to review the

entire record, the denial of Motion For Judgment n.o.v., and, finally in favor of the plaintiff, it would appear to warrant that this Court's scrutiny of this case in its view will determine that judgment entered by the trial Court should be reinstated.

We respectfully recommend that this Honorable Court grant this Petition.

Respectfully submitted,

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

United States Court of Appeals
For the First Circuit

No. 80-1529

JOHN J. BOLEMAN,

PLAINTIFF, APPELLEE,

v.

THE CONGDON AND CARPENTER COMPANY,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOHN J. MCNAUGHT, *U.S. District Judge.*]

Before
ALDRICH, CAMPBELL and BOWNES, *Circuit Judges.*

Richard A. Perras, with whom *Deutsch, Weintraub and Glazerman, P.C.*, *John L. Clark*, and *Edwards & Angell* were on brief, for appellant.

Dominic A. Caronna, with whom *Fusaro & Fusaro* was on brief, for appellee.

January 14, 1981

ALDRICH, *Senior Circuit Judge.* The primary question on this appeal from the denial of defendant's motion for judgment n.o.v. is whether the evidence, viewed most favorably to plaintiff, warranted a finding that he had a contract for lifetime employment. We hold it did not.

Plaintiff, Boleman, became employed by defendant Congdon & Carpenter Co. in 1937, starting at the bottom. Defendant was engaged in the production and sale, inter alia, of steel. It had several outside salesmen, each with an assigned, relatively small territory. In 1957 defendant decided to expand into the Worcester, Massachusetts area and one Cotter, its then sales manager, asked plaintiff if he would like to become

an outside salesman and be given that territory. Plaintiff at that time was living in Rhode Island and had an inside desk as manager of defendant's steel order department. Taking this new position would require his moving from Providence to Worcester. At the same time, in his words, it was a "promotion . . . with . . . the potential for greater earnings . . . an opportunity." He was 40 years old. According to plaintiff, Cotter's offer was as follows.

> "Worcester would be my home, it would be my base of operations, irrespective of what territory might be assigned to me. He told me he was giving me a lifetime opportunity. He said that with my knowledge, practical and technical, that I would have a job with the company for life."

After plaintiff had discussed the matter with his wife he returned to Cotter and said he was agreeable and Cotter "reiterated," saying,

> "I had a lifetime job with the company, that irrespective of the territory I might be assigned, Worcester would be my base of operations. And he repeated — if I remember correctly — that it was a lifetime opportunity."

There was no undertaking on plaintiff's part that he would remain with defendant any longer than he pleased.

In one part of plaintiff's testimony he stated that his understanding was that he was to "have the lifetime job as a salesman even though [he] weren't making any sales." At another he said he would not "necessarily [be] an outside salesman. But my understanding was that I could have a job with the company the rest of my life. I never put it in that one particular classification."

The first of these constructions, that plaintiff was permanently employed even though he failed to give satisfactory performance, would render the contract void for lack of consideration. *Cf. Kirkley* v. *F.H. Roberts Co.*, 1929, 268 Mass.

246, 252, 167 N.E. 289, 290; *Carnig* v. *Carr*, 1897, 167 Mass. 544, 547, 46 N.E. 117, 118. The second would raise perhaps insuperable difficulties in the way of lack of specificity, as to both performance and the measurement of damages, it being apparent that inside jobs paid less than outside, but with nothing to determine how much. *Cf. Kirkley* v. *F.H. Roberts Co.*, ante. Having in mind plaintiff's lack of outside experience, this transfer was by no means a mere theoretical possibility.

Passing these difficulties, and continuing with the evidence, with the exception of an exchange between plaintiff's wife and one Bump, post, the foregoing conversations were the only words ever exchanged on the subject between plaintiff and any employee of defendant until suit was brought following plaintiff's discharge in 1974 for refusing to transfer back to Rhode Island to take over the Rhode Island sales territory. Even when the transfer issue arose in 1973, with the threat of discharge, and was discussed for a year with plaintiff, on his own testimony, vigorously objecting, plaintiff said nothing about a lifetime contract, or an agreement that he would never have to leave Worcester. Instead, he based his whole protest on the fact that his wife was ill, and could not, or would not, go.

There was no writing. Cotter was deceased. Defendant's officers denied that plaintiff had a lifetime contract, and there was no evidence that any other employee possessed such.

A binding offer is made when the offeror leads the offeree reasonably to believe one has been made. *Timmins* v. *F.N. Joslin Co.*, 1939, 303 Mass. 540, 542, 22 N.E.2d 76, 77. At least unless words are unambiguously clear, their meaning may vary depending upon the total circumstances. *Campion* v. *Boston & Maine R.R.*, 1930, 269 Mass. 579, 581, 169 N.E. 499, 500; *Carnig* v. *Carr*, ante. In the present case this principle would seem to lead, factually, in precisely the opposite direction from *Carnig*, where such an agreement was found.

With plaintiff only 40 years old and lacking any experience as an outside salesman, we would find it hard to think that defendant was offering a binding commitment of lifetime employment, free of transfer from a yet untried territory, simply in consideration of his taking a promotion that would entail moving from Providence to Worcester. This difficulty is enhanced by plaintiff's asserted "understandings," mutually inconsistent, and each diminishing the enforceability of the agreement as a business undertaking. A far more reasonable, and perhaps the only fair interpretation is that plaintiff was simply assured of a promotional opportunity that was expected to last into the indefinite future; a statement of an "opportunity" with an expectation of continuance. *Cf. Kuzmeskus* v. *Pickup Motor Co.*, 330 Mass. 490, 493, 115 N.E.2d 461, 463. Hardly more could be expected in return for the minor nature of plaintiff's undertaking.[1]

We need not, however, reach such questions. The evidence does not warrant a finding that Cotter was authorized to make a lifetime agreement on any basis. However the contract be construed, it was well within the category of extraordinary agreements requiring the strongest proof of authority by the one making it to bind a corporate employer. Cotter, never an officer, was not shown to have authority even to hire salesmen in the ordinary course without the assent of his superiors. But even if he had such, the cases, without exception, hold that ordinary authority to hire is insufficient to bind a corporate employer to a lifetime obligation. So, too, is the holding of corporate office. *See Rydman* v. *Dennison Mfg. Co.*, 1977, 373 Mass. 855, 366 N.E.2d 763; *Lucey* v. *Hero Int'l Corp.*, 1972, 361 Mass. 569, 572, 281 N.E.2d 266 (president); *Simonelli* v. *Boston Hous. Auth.*, 1956, 334 Mass. 438, 137 N.E.2d 670 (personnel manager); *Chesapeake & Potomac Tel. Co.* v.

[1] Compare the seminal Massachusetts case of *Carnig* v. *Carr*, ante, where the plaintiff's promised lifetime employment was in consideration of his giving up his own competing business.

Murray, 1951, 198 Md. 526, 531-32, 84 A.2d 870, 872 (president); *James F. Monaghan, Inc. v. M. Lowenstein & Sons*, 1935, 290 Mass. 331, 333, 195 N.E. 101 (vice president). For this same reason, even if plaintiff had shown what, if any, office one Donald Bump held at the unspecified date when he spoke with plaintiff's wife, plaintiff's attempt to show company ratification of the contract must fail.

Reversed, judgment for defendant.

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JOHN J. BOLEMAN

v. Civil Action
75-2888-Mc

THE CONGDON AND CARPENTER COMPANY

J U D G M E N T

McNAUGHT, District Judge

Pursuant to the Mandate of the United States Court of Appeals for the First Circuit filed February 4, 1981

It is ORDERED and ADJUDGED that the Judgment entered March 17, 1980, is hereby vacated, and Judgment is here entered for the defendant The Condon and Carpenter Company. Complaint dismissed with costs.

Dated at Boston this 24th
day of February 1981

By the Court,

Karl W. Fagan
Deputy Clerk

The Court's Syllabus Of

His Charge To The Jury

ELEMENTS OF CAUSE OF ACTION

1. Defendant made a promise of Lifetime Employment in exchange for --
2. Plaintiff moving to and residing in Worcester and performing services requested.
3. The person who made promise for defendant, either
   (a) Had authority to make offer

   or

   (b) Made offer without authority, but, offer was "ratified" or adopted by a person with authority.
4. Plaintiff performed his part of the bargain.
5. Defendant failed to live up to its bargain.
6. Plaintiff suffered economic loss by reason of defendant's failure to per-

form its promise.

Loss of reasonably expected income through "Worklife" expectancy.

Minus

(A) Actual income received by plaintiff.

(B) Any amount he could reasonably have earned to "mitigate" his loss.

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FILED
JUN 11 1981
ALEXANDER L. STEVAS,
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No. 80-1926

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN J. BOLEMAN,
PETITIONER,

v.

THE CONGDON AND CARPENTER COMPANY,
RESPONDENT.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

Question Presented

Respondent respectfully submits that the question presented by Petitioner is misleading. The question presented should read as follows:

> Whether the Court of Appeals erred in holding that the evidence, viewed most favorably to plaintiff, did not warrant a finding that the plaintiff had an oral contract for lifetime employment?

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In the
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v.

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RESPONDENT.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The respondent in the above-entitled matter submits that the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") should be denied. The Appendices to the Petition (hereinafter "Pet. App.") are incorporated herein by reference.

Opinion Below

The opinion of the Court of Appeals for the First Circuit is set forth in full in the Appendix to the Petition.

Jurisdiction

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional or Statutory Provisions Involved

Respondent disagrees with petitioner's assertion that this case involves an interpretation of the Seventh Amendment.

Respondent respectfully submits that this diversity case involves only the question of sufficiency of evidence to warrant a finding of an oral contract of lifetime employment under state law and presents no question of constitutional or statutory interpretation.

Statement of the Case

The issue in this case is the validity of a discharged employee's claim of an oral contract for lifetime employment.

This claim is based upon state contract law principles involving no questions of constitutional or statutory interpretation.

The Court of Appeals for the First Circuit, in a unanimous decision written by Judge Aldrich, overturned a jury verdict for the plaintiff on the ground that the plaintiff had failed to produce evidence that the alleged contract was made or ratified by a person having the authority to bind the defendant corporation.[1] (Pet. App. 4A, 5A).

The facts, set forth in the opinion of the Court of Appeals (Pet. App. 1A-3A), may be summarized as follows:

In 1974, the plaintiff was discharged from employment as a salesman with the defendant after refusing to relocate from a Worcester, Massachusetts, sales territory to a Rhode Island sales territory.

After he was discharged, the plaintiff claimed that in 1957 he had been orally promised a lifetime job by the defendant's sales manager, Cotter.

Cotter died before trial.

---

[1] The Court of Appeals indicated that the alleged contract may also be void for lack of consideration and for failing to constitute a binding offer but did not reach those questions. (Pet. App. 2A, 4A).

The plaintiff introduced no evidence that Cotter had authority even to hire salesmen without the assent of his superiors.

The plaintiff introduced no evidence that any officer of the defendant with authority had ratified a lifetime contract with the plaintiff.

Reasons for Denying the Writ

I. The Plaintiff's Claim of an Oral Contract for Lifetime Employment Is of No Importance to the Public as Distinguished From the Parties to This Case.

This case presents neither legal nor factual issues of interest to the public.

As the Court of Appeals held, the legal principles regarding the validity of a lifetime contract are well settled, requiring "...the strongest proof of authority by the one making it to bind a corporate employer... [T]he cases, without exception, hold that ordinary authority to hire is insufficient to bind a corporate employer to a lifetime obligation." (Pet. App. 4A). It is therefore submitted that this case involves no novel or unsettled legal issue of interest to the public.

The factual issues in this case are clearly of interest only to the parties since they are limited to the private employment relationship between the plaintiff and his former corporate employer. As the Court of Appeals found, this case turns primarily on the plaintiff's failure to introduce evidence that a person with requisite authority made or ratified his alleged oral lifetime contract. The resolution of this factual dispute is patently of no interest to anyone but the parties.

Therefore, in accordance with this Court's recognition of the importance of "...not granting the writ of certiorari except in cases involving principles the setlement of which is of importance to the public as distinguished from that of the parties...",

Layne & Bowler Corporation v. *Western Well Works, Inc.*, 261 U.S. 387, 293, the instant petition for a writ of certiorari should be denied.

II. The Decision of the Court of Appeals That the Evidence Did Not Warrant a Finding Of an Oral Contract for Lifetime Employment Is Clearly Correct.

The Court of Appeals. as stated in its unanimous decision written by Judge Aldrich, applied exactly the standard of review asserted by the petitioner, i.e., "...whether the evidence, viewed most favorably to plaintiff, warranted a finding that he had a contract for lifetime employment." (Pet. App. 1A). It is submitted that the Court of Appeals was correct in holding that the evidence introduced by the plaintiff did not meet this standard.

The decision of the Court of Appeals is fully in accord with a number of Massachusetts cases requiring the strongest proof of authority to bind a corporate employer to an alleged lifetime agreement. (Pet. App. 4A). The plaintiff has failed to cite a single decision from any jurisdiction upholding a lifetime contract upon facts similar to those in this case. The complete lack of precedent in support of the plaintiff's claim reflects the accuracy of the Court of Appeals' finding that the plaintiff failed to introduce evidence that the alleged oral lifetime contract was either made or ratified by a person with requisite authority.

The Court of Appeals found that the deceased sales manager, Cotter, who allegedly made the oral lifetime promise, was not shown to have requisite authority. (Pet. App. 4A). The Court also found that there was no evidence of ratification by any person with authority. (Pet. App. 5A).

In the Petition, no evidence is cited contrary to the finding of insufficient evidence of Cotter's authority. Rather, the Petition cites facts clearly inadequate to establish Cotter's authority, such

as the fact that Cotter "...was a graduate of a law school." (Pet. 3, 4). As to ratification, the Petition contains no reference to any evidence of the authority of the defendant's former officer Bump at the time of his alleged ratification. (Pet. App. 5A). The Petition points to no evidence of knowledge or ratification of a lifetime promise by any other officer, citing such obviously inadequate testimony as the defendant's former president's assistance to the plaintiff in his relocation in 1957. (Pet. 11).

In summary, Petitioner cites no precedent contrary to the Court of Appeals' finding that the facts in this case do not support a lifetime contract, points to no evidence contrary to the Court of Appeals' finding of lack of proof of requisite authority and does not contest the settled principle of requiring the strongest proof of authority for claims of lifetime contracts. It is therefore submitted that the decision of the Court of Appeals should be accepted as correct.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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80-1926

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Docket No. 80-1926

JOHN J. BOLEMAN,

Petitioner

vs.

THE CONGDON AND CARPENTER COMPANY

Respondent

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Is a suit commenced under the Age Discrimination of Employment Act (U.S.C.A., Title 29, Sec. 621, et seq.) but tried solely on the count in contract also alleged in the same complaint "involve principles the settlement of which is of importance to the public as distinguished from that of the parties?"

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BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preface

The Petition herein presented the question whether the Court of Appeals marshalled the facts most favorable to the plaintiff according to the standards of review of a Motion notwithstanding the verdict, allowing the plaintiff the benefit of all favorable and reasonable inferences. In the argument Petitioner attempted to show that the District Court did not err in submitting the case to

the jury, and particularly noted this Court's regard for the criteria in preserving jury verdicts.

The Respondent's Reply Brief presented the question whether the Court of Appeals erred in holding that the evidence did not warrant a finding of a lifetime contract. It argued in part that the plaintiff's claim was in fact no more than a dispute between the parties themselves, and of no importance to the public.

Respondent's Contention

The Respondent's position is that the Writ should not be granted because this case does not involve principles "the settlement of which is of importance to the public as distinguished from that of the parties citing Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 293 (1923).

We maintain this position is unwarranted.

Reasons For Granting The Writ

I. The Respondent's position that the contract for lifetime employment is of no

importance to the public as distinguished from that of the parties avoids the central question in this case.

The Respondent chooses to emphasize the finding by the Appellate Court that there was "no authority" on the part of the sales manager, Mr. Cotter, to offer a lifetime contract to the plaintiff, as the sole issue. However, the crucial point underlying the question presented in the Petition is whether or not the District Court erred in allowing the case to go to the jury, which essentially raises the issue of the constitutional right to have a case go to a jury when the trial court believes that there is sufficient evidence to warrant its submission. We emphasized this point in our initial brief in connection with numerous cases noting this Court's jealous regard for the protection of jury verdicts. Indeed this is of sufficient "importance to the public" as to come within Rule 17 of the Rules of this Court and within

the purview of the Layne case.

II. A matter brought under the Age Discrimination of Employment Act is a matter of importance to the public as distinguished from that of the parties.

Since the date of the Layne decision there has been considerable legislation on socio-economic issues that were of such a constitutional, and thus "public", character as to become a matter of federal law; such as N.L.R.A., F.E.L A , Jones Act, Civil Rights, and Age Discrimination In Employment Act (U.S.C.A. Title 29, Section 621, et seq.) under which latter Act the instant case was brought, and properly retained in this Court. We note its relevancy.

Before filing this suit in the Federal Court under the above Discrimination Act, plaintiff endeavored to comply with Section 623 of the Act's requirement that filing a complaint in a state commission on discrimination shall preempt the commencement of a suit

in the Federal Court. In early 1975, plaintiff's counsel was informed by the Massachusetts Commission on Discrimination that it was not then "functioning" as usual because the Commission had been given no budget for that year, had a three-year back-log of cases, and that as a result, no one knew when, if at all, hearings would be resumed. To confirm this, this counsel met with the Commissioner who showed him that a prior discrimination case filed by the firm's client was "somewhere on the books" for more than two years. Relying on the case of Vaughan v. Chrysler Corp., D. C., Mich. 1974, 382 F. Supp. 143, counsel for plaintiff in good faith advised his client that under the circumstances outlined above, suit could still be brought directly in the Federal Court. On the defendant's Motion To Dismiss because of failure to comply with the said Section 623, the hearing Court (Skinner, J.) refused to accept plaintiff's argument, dismissed the discrimination aspect of the case, but let the cause on contract stand. We respectfully

suggest that the mere technical cutting off of the quasi-penal aspect of the discrimination claim alleged in the complaint did not strip the complaint of its "federal" character. On this posture of the case, then, we respectfully say that the instant case, in the light of all the facts and inferences it expected to reveal, retains the "public" character sufficient to bring it within the purview of Rule 17.

III. Notwithstanding the Layne case, this Court has exercised broad discretion in proceeding under Rule 17 of the Rules of this Court.

In a wrongful death action brought to this Court on the question whether a state or federal rule of the sufficiency of evidence should apply, the Court left that issue open, yet reviewed the case and reinstated the verdict for the plaintiff. Dick v. New York Life Insurance Co., 395 U. S. 437, 445, 79 S. Ct. 921, 926, 927, 3 L. Ed. 2d 935 (1959).

In another case involving the same question of the sufficiency of evidence, the Court said that "The evidence was sufficient under any standard which might be appropriate- state or federal." Mercer v. Theriot, 377 U. S. 152, 84 S. Ct. 1157, 1160, 12 L. Ed. 2d 206 (1964), (citing the Dick case). The Court generously touched upon the Court proceedings and found that "the trial judge conducted the trial with scrupulous regard for the litigant's rights." (cf. Longnecker v. G. M. Corp., 549 F 2d 1283, 1286, CA 9, (1979); Dick vs. New York Life Insurance Co. (supra) 359 U. S. 437, 447 (1979).

The above instances show that since the Layne case, and under Rule 17, this Court has exercised broad discretion in reviewing matters where the petition for certiorari did not conspicuously involve "a matter of importance to the public...", but the Court decided to review the case in any event.

Of special interest to this Court may be a case that appears to parallel the instant

case in which the Appeals Court of Massachusetts recently decided that "in every contract there exists an implied covenant of good faith and fair dealing." Maddaloni v. Western Mass. Bus Lines, Inc., Mass. App. 422 N. E. 2d 1379, 1383, (1981). It also decided the reliability of determining future damages. Thus the Court reduced to writing the public character that was always implicit in every contract of employment, and certainly implicit in all of the Federal Statutes on Labor, Employment, Discrimination, Civil Rights, etc.

Lastly, and as a post-script to the Mercer case (supra) and this Court's regard for a lower court's treatment of a case, we add a note that might properly have appeared in the initial brief.

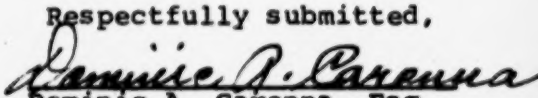
In the instant case the trial judge permitted the jury to take notes in the course of the trial, had them sealed overnight, and gave the jury copies of the outline of his charge, (Record Exhibit pp. 208, 209). Thus the "probability" that six jurors could mis-

understand or happily ignore the law" was far less likely than in the ordinary case, thus minimizing the "measure of speculation and conjecture" that the Supreme is wont to allow in any event. (cf. Cooper, Directions For Directed Verdicts: A Compass for Federal Courts, 1971, 55 Minn. L. Rev. 903, 921).

CONCLUSION

We respectfully suggest that the instant case goes far beyond the mere factual interest between the parties only. It is clothed with the public regard for "good faith and fair dealing" as recently decided Thus, we respectfully pray that this Court will grant the Petition and have the opportunity to view all of the "considerations which emerge after full briefing and oral argument."

Respectfully submitted,



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